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IN THE

Supreme Court of the United States

October Term, 1953.

No. 13.

POPE & TALBOT, INC.,
Petitioner,

v.

CHARLES HAWN
and
HAENN SHIP CEILING AND REFITTING CORPORATION.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR PETITIONER, POPE & TALBOT, INC.

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BRIEF FOR PETITIONER, POPE & TALBOT, INC.

OPINIONS BELOW.

The opinion of Judge McGranery of the United States District Court for the Eastern District of Pennsylvania, filed July 17, 1951 (R. 192a)* is reported at 99 F. Supp. 226. Judge McGranery's supplemental opinion, embodying the entry of judgment filed September 28, 1951 (R. 202a) is reported at 100 F. Supp. 338. The opinion of Circuit Judge McLaughlin of the United States Court of Appeals for the

* Numbers within parentheses refer to pages in the printed record.

Third Circuit, filed August 27, 1952 (R. 231, as amended September 4, 1952 (R. 246) and November 3, 1952 (R. 272)) is reported at 198 F. 2d 800.

JURISDICTION.

The jurisdiction of this Court to review the final judgments of the United States Court of Appeals for the Third Circuit is provided by § 1254(1) and § 2101(e) of Title 28, U. S. Code.

STATEMENT OF THE CASE.

This is a civil action brought by respondent Charles Hawn (hereinafter referred to as "Hawn") against petitioner, Pope & Talbot, Inc. (hereinafter referred to as "Pope & Talbot"), to recover damages for personal injuries sustained aboard Pope & Talbot's vessel "John Dickinson". Hawn was a foreman carpenter employed by an independent contractor, the respondent Haenn Ship Ceiling and Refitting Corporation (hereinafter referred to as "Haenn"). Hawn was injured while effecting certain alterations and repairs to the vessel's grain fittings while the vessel was berthed at a pier in Philadelphia, Pennsylvania on November 16, 1947.

Hawn brought his suit in the United States District Court for the Eastern District of New York (R. 7a). He alleged jurisdiction upon the basis of diversity of citizenship (R. 7a-8a). Pope & Talbot having attacked the propriety of venue, the action was transferred to the United States District Court for the Eastern District of Pennsylvania (R. 11a).

In its answer to the complaint (R. 12a) and its answer to the amended complaint (R. 20a, 21a), Pope & Talbot asserted inter alia, the defense of contributory negligence. Pope & Talbot brought in Haenn as a third-party defendant, claiming recovery over against Haenn by way of contribution or indemnity (R. 13a). Pope & Talbot likewise

brought in Atlantic & Gulf Stevedores, Inc. as a third-party defendant, but the action as to Atlantic & Gulf was dismissed prior to trial by stipulation (R. 25a).

The case was tried to a jury, which returned a special verdict in favor of Hawn and answered certain interrogatories (R. 180a-182a). In its answers to the interrogatories, the jury found:

(1) that Pope & Talbot's vessel was unseaworthy;

(2) that both Pope & Talbot and Haenn were negligent;

(3) that Hawn's own negligence contributed to his injuries to the extent of 17½%; and

(4) that Hawn's damages "without consideration of contributory negligence" were $36,000.00.

All of the parties filed post-trial motions. Pope & Talbot moved, inter alia, for entry of judgment in its favor, and against Hawn, on the ground that Hawn's contributory negligence barred recovery. In the alternative, Pope & Talbot moved that Hawn's judgment against it be in the sum of 50% of the damages assessed. Pope & Talbot further moved for judgment in its favor and against Haenn in the full amount of any judgment entered in favor of Hawn and against Pope & Talbot or, in the alternative, that judgment be entered in Pope & Talbot's favor, and against Haenn in the sum of one-half of any judgment entered in favor of Hawn and against Pope & Talbot (R. 185a).

Haenn moved, inter alia, for judgment in its favor, and against Pope & Talbot (R. 183a). Hawn moved for judgment in his favor, and against Pope & Talbot, in the sum of $36,000.00 (R. 188a).

The District Court disposed of the various motions by opinion dated July 17, 1951 (R. 192a). The District Court held that judgment should be entered in favor of Hawn in the sum of $29,700.00, representing the amount of Hawn's

damages diminished by 17½%. The District Court further held that Haenn should contribute to Pope & Talbot the sum of $14,850.00, unless the limit of Haenn's liability to Hawn under the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 901 et seq. should be a smaller amount, in which event such smaller amount was to be the measure of Haenn's contribution to Pope & Talbot.

After a further hearing the District Court on September 28, 1951 entered judgment in favor of Hawn and against Pope & Talbot in the sum of $29,700.00 and in favor of Pope & Talbot and against Haenn in the amount of $8,331.35, the latter sum representing the stipulated limit of Haenn's liability to Hawn under the Compensation Act. The judgment granted leave to Haenn to move for modification of the judgment against it "should it hereafter appear that for any reason it may be relieved from paying the full limit of its obligation for compensation under the Longshoremen's and Harbor Workers' Act." (R. 202a-203a).

Both Pope & Talbot and Haenn appealed to the Court of Appeals for the Third Circuit. Pope & Talbot's appeal, docketed as No. 10,630, attacked (1) the judgment in favor of Hawn and against Pope & Talbot and (2) the amount of the judgment in favor of Pope & Talbot and against Haenn. Haenn's appeal, docketed as No. 10,613, attacked the judgment entered against it and in favor of Pope & Talbot.

The appeals were heard and decided together. In its opinion by Judge McLaughlin dated August 27, 1952 (R. 231) the Court of Appeals held that the principle of "comparative negligence" applied and sustained Hawn's $29,700.00 judgment against Pope & Talbot. The Court rejected Pope & Talbot's alternative contention that Hawn's recovery against it should be reduced by the amount of payments which Haenn was obliged to pay to Hawn under the Longshoremen's and Harbor Workers' Compensation Act. Finally, the Court held that Pope & Talbot could recover nothing from Haenn.

The judgments of the Court of Appeals were entered on August 27, 1952 (R. 244, 245). Pope & Talbot filed a petition for rehearing in its appeal (R. 251), which was denied on October 8, 1952 (R. 269). On November 3, 1952, the Court amended the final paragraph of its opinion, which contained only the decretal language, to conform with the sense of the opinion (R. 272). The judgments were correspondingly amended on November 3, 1952 (R. 273, 274).

After obtaining an extension of time by order of Mr. Justice Burton (R. 279), Pope & Talbot filed its petition for a writ of certiorari on January 6, 1953. Pope & Talbot's petition was granted on June 15, 1953 (R. 279).

QUESTIONS PRESENTED.

These are the questions presented by the present writ:

1. An employee of an independent contractor sustained injuries while working aboard a ship docked upon navigable waters within the territorial jurisdiction of a state under whose internal law contributory negligence bars recovery. He sued the shipowner on the civil side of the District Court under its diversity of citizenship jurisdiction. May the plaintiff recover, notwithstanding the jury's finding that he was contributorily negligent? If so, does plaintiff's contributory negligence result in recovery of half of the damages assessed by the jury, or does it result in recovery of the damages assessed diminished only by the percentage that a jury may find represents the quantam of negligence which plaintiff contributed to his own injury?

2. Pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 901 et seq., the plaintiff's employer had made certain payments to the plaintiff. Under an agreement to which the shipowner is not a party, the plaintiff is to repay the employer, out of his recovery against the shipowner, all sums paid to him by the employer under the Compensation Act. The jury found that the employer's negligence had contributed to the

plaintiff's injuries. The shipowner, held liable to the plaintiff, was denied any recovery from the employer. In these circumstances, should not the plaintiff's recovery against the shipowner be reduced to the extent of the payments made by the employer to the plaintiff, thus preventing either (1) double recovery by the plaintiff, or (2) indemnification of the negligent employer at the expense of the shipowner?

3. Is the warranty of seaworthiness owing by a shipowner to employees of a stevedore under *Seas Shipping Company v. Sieracki*, 328 U. S. 85, likewise owing by a shipowner to an employee of a carpentry contractor engaged in alterations and repairs to a vessel's fittings?

SPECIFICATIONS OF ERROR.

Petitioner urges that the Court of Appeals for the Third Circuit erred in the following respects:

1. In holding that the rule of loss distribution which it approved, denominated "comparative negligence," was the established admiralty doctrine.

2. In approving the computation of damages recoverable by Hawn from Pope & Talbot on the basis simply of deducting from the total damages sustained a percentage representing the quantum of negligence which Hawn contributed to his own injury.

3. In holding that Hawn's contributory negligence did not bar recovery.

4. In holding that the sums paid by Haenn to Hawn, or on his behalf, under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq., should not be deducted from the amount of any judgment which would otherwise result in Hawn's favor by the application of the rule in (2) above.

5. In holding that Pope & Talbot warranted the seaworthiness of its vessel and her appliances to Hawn.

SUMMARY OF ARGUMENT.

As to the First Question: The Effect of Contributory Negligence Upon Recovery.

The Court below held that Hawn could recover from Pope & Talbot his total damages, diminished only by the percentage which the jury found to represent the quantum of negligence which Hawn contributed to his own injury. The Court viewed this result as an application of the established admiralty doctrine of "comparative negligence," notwithstanding that the jury found that all three parties were at fault.

The rule approved below is not the established admiralty doctrine. The admiralty courts have never developed a definitive rule governing the factual situation in the present case. Even in the simple situation where the fault of only libellant and respondent combined to produce the injury, the admiralty authorities are in disagreement as to the method of computing the libellant's damages. The most that admiralty jurisprudence can offer is a number of different rules, some of which are mutually inconsistent.

Nor is the rule fashioned below one of "comparative negligence" as that term is understood to contemplate an adjustment of the injured party's loss on the basis of the proportions of fault which the respective parties contributed to the casualty. To make Pope & Talbot liable for the entire damages, diminished only by the percentage of fault which Hawn contributed, is to make Pope & Talbot accountable for Haenn's fault as well as its own.

This Court has never approved any definitive rule applicable in admiralty as to the method of computing a contributorily negligent libellant's recovery. Nor is this an appropriate situation for the approval or announcement of such a rule. The same considerations as militated against the fashioning of a rule governing loss distribution as be-

tween joint tortfeasors in *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282, are present to an even greater degree in this case. Under these circumstances, the announcement of any rule in derogation of the common law, as between Hawn and Pope & Talbot, should be made by Congress. Pending such action the rights of the parties, as in *Halcyon*, should be determined by the common law rule, under which contributory negligence bars recovery.

Even if this Court should hold that there is an established rule which would apply to the facts of this case in courts of admiralty, or should this Court formulate such a rule, nevertheless the rule applicable in the admiralty jurisdiction does not apply in the case at bar. This is an action at law in which jurisdiction of the District Court is based upon diversity of citizenship. The tort which produced Hawn's injuries was committed within the territorial waters of Pennsylvania, where the Court was sitting. The decision of this Court in *Caldarola v. Eckert*, 332 U. S. 155, establishes the right of a State to apply its substantive law to such controversies. Under Pennsylvania law contributory negligence, however slight, bars recovery. Therefore the District Court, under *Erie R. Co. v. Tompkins*, 304 U. S. 64, was obliged to apply the Pennsylvania rule in determining the effect of Hawn's contributory negligence upon recovery. Accordingly, it should have entered judgment in favor of Pope & Talbot.

As to the Second Question: Whether Haenn is Entitled, in Effect, to Indemnify Itself at Pope & Talbot's Expense.

Haenn, as Hawn's employer, had made certain payments to Hawn, or for his account, under the Longshoremen's and Harbor Workers' Act, *supra*. The items covered by these payments were among those for which the jury compensated Hawn by its verdict. Under the law, Hawn may not retain both his damages and the compensation

benefits. Therefore the only alternative, which is in fact the subject of a private agreement between Hawn and Haenn, would be for Hawn to reimburse Haenn out of his recovery against Pope & Talbot.

This result is unsupportable, particularly where the amount owing by Pope & Talbot under the rule below represents in part the product of Haenn's own fault. It would mean that Haenn, a party at fault, would make itself whole at Pope & Talbot's expense, notwithstanding that *Halcyon* prevents the recovery of contribution by Pope & Talbot from Haenn in the circumstances. Such a result is neither consistent with the purpose of the Harbor Workers' Act, nor consonant with the *Halcyon* decision, *supra*.

The Harbor Workers' Act does not recognize any right of subrogation in Haenn in the circumstances. Nor is there any other legal basis or theory upon which Haenn's recovery can be supported. Accordingly, the only proper solution is to permit Hawn to retain the compensation benefits, and to deduct the amount thereof in the first instance from any judgment which would otherwise be recoverable by Hawn against Pope & Talbot.

As to the Third Question: Whether Pope & Talbot Warranted the Seaworthiness of Its Vessel and Her Appliances to Hawn.

In *Seas Shipping Company v. Sieracki*, 328 U. S. 85, this Court held that a shipowner warrants the seaworthiness of its vessel and her appurtenances to an employee of a stevedore contractor engaged in loading cargo. In conflict with an established line of cases from the Second Circuit, the Court below, borrowing general language from the *Sieracki* decision, further extended the warranty to one in Hawn's circumstances.

Hawn does not fall within the defined class of persons to whom the doctrine of unseaworthiness was originally extended in *Sieracki*. Nor is there anything to show that

the work he was performing was traditionally performed by members of the vessel's crew, or that he was exposed to any hazard peculiar to a seaman's employment.

Rather than presenting a situation calling for the further extension of the *Sieracki* doctrine, the present case suggests the propriety of reappraising the validity of the doctrine itself. Particularly to the extent that the dissent in *Sieracki* relies largely upon the impact of Congressional legislation in the field of longshoremen's personal injury, and points out the lack of integration therewith implicit in the result reached by the majority in *Sieracki*, the dissent accurately forecast the approach to the whole problem of maritime personal injury taken in the *Halcyon* case. In this regard, at least, the decision in *Sieracki* warrants re-examination and, for the reasons advanced in the dissent, should be overruled.

ARGUMENT.

First Question: The Effect of Contributory Negligence Upon Recovery.

1. The Rule Below Is an Announcement of a New Principle Under Circumstances Not Permitting the Fashioning of a Substantive Rule by the Courts.

In determining the effect of Hawn's contributory negligence upon his recovery, the Court below purported to apply the principle of "comparative negligence". Without further ado, let us tear off this label and examine the contents of the package.

The jury found that the fault of Hawn, Pope & Talbot, and Haenn combined to produce Hawn's injury. Hawn's own fault was assessed at 17½%. The remaining fault was by definition shared by Pope & Talbot and Haenn—in what proportions, the record does not show. The Court of Appeals considered that the "plain inference" is that Pope & Talbot and Haenn "were found to be concurrently and equally at fault" (R. 241).

On these facts the Court below held that Hawn should recover from Pope & Talbot his damages diminished only to the extent of 17½%. In other words, Hawn is held accountable only for his own fault, whereas Pope & Talbot is made to pay for Haenn's fault, as well as its own.

The rule announced below is *sui generis*. It defies categorical definition. However, it is susceptible to partial analysis which helps to identify its incompatible components.

The rule fashioned below is essentially a mingling of two concepts, each of which is anathema to the other:

1. The concept which holds that Pope & Talbot is accountable for Haenn's fault as well as its own is consonant with the common law and its "all or nothing" philosophy of loss distribution, under which a defendant tort feasor,

regardless of the culpability of others, pays all of the damages or none, depending upon whether the plaintiff was contributorily negligent.

2. The concept which holds that Hawn's contributory negligence does not bar recovery, but merely diminishes the amount recoverable, is a partial application of the doctrine sometimes called comparative negligence, which holds that contributory negligence does not bar recovery, but that the formula of recovery is based upon the quantum of fault of the respective parties.

Thus the Court below has attempted to synthesize two diametrically opposed concepts. Moreover, its product attempts to retain as undiluted ingredients the very tenets on which these concepts are in irreconcilable conflict, both logically and legally.

It is apparent that the totality of the rule fashioned below does not conform with basic theories of comparative negligence nor rudimentary principles of justice, if the degrees of fault of the actors are to be considered and "compared" at all. The rule below does not compare Hawn's fault with Pope & Talbot's; rather, it "compares" Hawn's fault with the *combined* fault of Pope and Talbot and Haenn, and makes Pope and Talbot responsible for all of the latter.

"Comparative negligence", as the Court below calls it, is thus made to serve only Hawn. The rule below extends to him a right which would be defeated by his contributory negligence under the common law. Yet, insofar as the fault of Pope & Talbot and Haenn is concerned, the remnants of common law reasoning survive so as to deprive Pope & Talbot of the benefit of "comparative negligence" as it is extended to Hawn.

Nor can the rule below be defined accurately in terms of "apportionment" of damages. It hands one portion of the consequences of blame to Hawn, two portions to Pope & Talbot.

In fashioning the rule here challenged, the Court below purported to choose between the Pennsylvania law and the "admiralty doctrine", and professed to select the latter. Actually, it did no such thing. The rule below, as we shall demonstrate later, was never originated or developed in the admiralty. The Court below neither borrowed nor applied; it created.

We propose to demonstrate that there was no warrant or occasion for the Court below to look beyond the Pennsylvania law (which follows the common law) in determining the effect of contributory negligence upon recovery. Even if it were permissible for the Court to look elsewhere, we shall further demonstrate that the Court really had no genuine choice under the circumstances. This is so because there is no established admiralty rule of loss distribution in personal injury cases involving fault of more than two parties. The most that admiralty doctrine can do is to offer faint intimations, and those purely by analogy, of several different rules, none of which corresponds with the rule announced below.

One paramount point stands out in bold relief. The decision below, both in the process by which it was reached and in its effect, runs headlong into conflict with the decision of this Court in *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corporation*, 342 U. S. 282. For this reason alone the decision below cannot stand.

In striking down an attempt to enforce contribution between joint tortfeasors, the *Halcyon* case established that courts are not free to fashion substantive rules of loss distribution in derogation of the common law in a field in which Congress has legislated extensively, but has stopped short of approving the rule sought to be established. This Court recognized that if a new rule were to be announced, Congress should announce it through the "legislative process which is peculiarly adapted to determine which of the many possible solutions . . . would be most beneficial in the long run" (at 342 U. S. 286).

This case presents the same fundamental problem as did *Halcyon*—loss distribution among members of the maritime community in personal injury cases. It encompasses the specific facet of the problem considered in *Halcyon*—the proper allocation of the incidents of loss as between shipowner and employer. Added to this problem in the instant case is one which is even more troublesome, more fraught with confusion—the allocation of loss as between plaintiff-employee and defendant-shipowner. Obviously the latter problem is inextricably bound up with the former.

This complex of problems cannot adequately be treated piecemeal. To view any of its aspects as independently capable of judicial solution is to fetter those untouched with predetermined premises which are more likely to embarrass than to assist the congruous resolution of the whole.

Halcyon lays considerable emphasis upon the fact that Congress has already legislated extensively in the maritime personal injury field. It takes particular note of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U. S. C. § 901 et seq., which this Court said must, in turn, be integrated with other legislation such as the Jones Act, 41 Stat. 1007, 46 U. S. C. § 688; the Public Vessels Act, 43 Stat. 1112, 46 U. S. C. § 781-790; the Limited Liability Act, R. S. § 4281, as amended 46 U. S. C. § 181 et seq., and the Harter Act, 27 Stat. 445, 46 U. S. C. § 190-195.

Let us consider for a moment the extent to which the decision below immediately impinges upon the Harbor Workers' Act, and raises serious questions as to whether it does not actually run afoul of it.

The Harbor Workers' Act, which covers longshoremen, and the Jones Act, which covers seamen, "provided means for indemnification for injuries for all maritime employees who were beyond the constitutional reach of state legislation. A quarter of a century of experience has not caused Congress to change the plan." *Pennsylvania R. Co. v. O'Rourke*, 344 U. S. 334.

The "plan" established by the Harbor Workers' Act for the class of maritime employees to which Hawn belongs substitutes a schedule of compensation for a right of action for damages against the employer. In so doing, as this Court observed in *Halcyon* (at 342 U. S. 285-286) Congress "has made fault unimportant in determining the employer's responsibility to his employee; Congress has made further inroads on traditional court law by abolition of the defenses of contributory negligence and assumption of risk. . . . " Not only does the Harbor Workers' Act provide elaborately for the discharge of an employer's obligations thereunder; it contemplates the maintenance of an action by the employee against a "third person"—in the vast majority of instances, as in this case, the shipowner upon whose premises the work is being done. Section 33. It also provides for the distribution of the proceeds from such third party recovery. Section 33.

What is significant for present purposes is that Congress, in the Harbor Workers' Act, said nothing whatsoever as to how the third party action was to be prosecuted. Specifically it had nothing to say as to the method by which the longshoreman's damages were to be ascertained, nor did it see fit to abolish any of the common law defenses which the third party might raise. In these respects Congress made no "inroads" on traditional tort law. The Court below speaks where Congress stood mute.

While as between employee and employer the Harbor Workers' Act strips the latter of the common law defenses and makes his fault unimportant in determining his liability under the compensation schedule, at the same time the Act insulates the employer from liability of any other sort to the employee or anyone else claiming in his right. Section 5. Thus, as it is sometimes said, there is a "quid pro quo" as between employer and employee.

A corresponding mutuality of benefit is conspicuously absent as between employee and shipowner where, as in the rule below, the latter is not only stripped of the defense

of contributory negligence, but is made liable in damages measured, in part, by the quantum of the employer's fault.

These two concepts simply do not mesh. They can scarcely be components of a symmetrical whole.

Another aspect of the rule below involves a genuine problem of integration with the Harbor Workers' Act. As this Court observed in *Halcyon*, Congress made the employer's fault unimportant in determining the employee's rights under the Act. But did Congress likewise intend that the employer's fault should become important, and its burden shifted to the third party in the employee's action against him and specifically, that the quantum of the employer's fault should be made an ingredient in the formula of recovery? That is the effect of the decision below. It is also inescapable that to the extent that the amount of Hawn's recovery is attributable to fault on the part of Haenn, Hawn is being compensated according to a tort-action measure of damages, not according to the statutory schedule.

It must also be remembered that under *Halcyon*, Pope & Talbot is denied the right to recover anything from Haenn. Yet the Court below has, in effect, approved the repayment by Hawn to Haenn, out of Hawn's recovery against Pope & Talbot, of such sums as Haenn was obliged to pay to Hawn under the Harbor Workers' Act. Thus, notwithstanding *Halcyon*, Haenn is permitted to make itself completely whole at Pope & Talbot's expense out of a fund which is the product, in part, of Haenn's own fault. This does not conform with basic notions in integration.

The foregoing circumstances lead to a corollary observation as to the impact of the present decision upon the Congressional plan incorporated in the Harbor Workers' Act. Had Pope & Talbot not been at fault in the present case, Haenn would have been obliged to bear the entire loss imposed upon it by Congress in the first instance. Yet, by the fortuitous circumstance that Pope & Talbot combined with Hawn and Haenn to produce Hawn's injuries, Haenn's *entire* burden is shifted to Pope & Talbot. Is it conceivable

that the vagaries of a particular factual situation were intended to work such a drastic change in the obligations which Congress initially imposed upon the employer?

From the foregoing it is obvious that the present decision has a greatly multiplied potential of entanglement with the Harbor Workers' Act—the very consequence which this Court avoided in the *Halcyon* case by refusing to create substantive rules in derogation of the common law in a field already occupied so extensively by Congress. Beyond that, the rule below is directly opposed, on principle, to the end result in *Halcyon*. In *Halcyon* this Court sanctioned the application of the common law rule of no contribution as between joint tortfeasors, who there stood in the relation of defendant and third party defendant. As between them, the loss was permitted to lie where it was initially sustained. Scant logic compels a contrary result where the partners in fault stand in the relation of plaintiff, defendant, and third party defendant.

The fundamental approach to the problem taken in *Halcyon*, while an eminently justifiable one, is by no means novel, even in maritime affairs.

> " . . . we must always remember that the court cannot make the law; it can only declare it. If, within its proper scope, any change is desired in its rules, other than those of procedure, it must be made by the Legislative Department . . . " *The Lottawanna*, 21 Wall. 558.

This same policy was thus articulated by this Court in another landmark case:

> "A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will . . . of the legislature, unless pre-

vented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances." *Second Employers' Liability Cases*, 223 U. S. 1, quoting from *Munn v. Illinois*, 94 U. S. 113, 134.

The "great office of statutes" assumes even greater importance where so many important and divergent interests are necessarily affected, as they are by the rule announced below. Problems of this magnitude should not be resolved by the judicial process, nor their solution influenced by the persuasiveness, or lack of it, of the particular parties before the Court in a given litigation. It may well be that a shift in the tide of policy dictates amelioration of the common law rule that contributory negligence bars recovery, and that some rule of true comparative negligence, which the Court below attempted to, but did not succeed in formulating, will prove to be the best solution. If so, it is for Congress to determine through the legislative process which alone is adapted to hear, and to pick and choose from among the views of all concerned. If deviations from the common law are in order, this course offers the only reasonable assurance that the end result will be amelioration, and not just change.

It is implicit in *Halcyon* that this Court had never expressly approved the rule there sought to be established. The same is true of the rule which Pope & Talbot here attacks. It has never been established in the general maritime law, nor has this Court remotely intimated its approval thereof. To demonstrate this fact, we turn to a consideration of the authorities which are said to establish the rule as to the effect of contributory negligence in personal injury cases under the general maritime law. Analysis of the authorities does more than establish that, as in *Halcyon*, this Court has never approved the rule below. It further demonstrates that it cannot be said with any

degree of certainty that there is any definitive rule governing the effect of contributory negligence upon recovery in cases involving only two parties, let alone a three-party community of fault such as presently exists. This latter conclusion, in turn, makes it clear that the Court below really had no established rule of the admiralty which it could have applied in preference to the common law rule, even if the Court otherwise had a choice in the matter.

2. THE RULE FASHIONED BELOW IS NOT IN ACCORDANCE WITH ANY ESTABLISHED ADMIRALTY DOCTRINE. ADMIRALTY JURISPRUDENCE HAS NOT DEVELOPED ANY DEFINITIVE RULE AS TO THE EFFECT OF CONTRIBUTORY NEGLIGENCE UNDER THE CIRCUMSTANCES HEREIN. IN ACCORDANCE WITH THE HALCYON DECISION, NO RULE SHOULD BE ANNOUNCED BY THE COURT IN THIS CASE. THEREFORE, AS IN HALCYON, THE COMMON LAW RULE GOVERNS, UNDER WHICH HAWN'S CONTRIBUTORY NEGLIGENCE BARS RECOVERY.

> *"Even as to admiralty jurisdiction we must be wary of verbal generalizations unrelated to their applications."*—Mr. Justice Frankfurter, speaking for this Court in *Swift & Co. v. Compania Colombiana Del Caribe,* 339 U. S. 684, 690.

Nowhere is the wisdom of this injunction more aptly demonstrated than in the field of maritime personal injury loss distribution. This subject has been so beset with "verbal generalizations" that the end result has inevitably been the lack of any definitive rule.

Specifically, the general maritime law has never developed any concrete rule of loss distribution in personal injury cases involving fault of three or more parties. There are, of course, many cases involving the simpler situation of loss-sharing as between only libellant and respondent. Representative cases in this category will be analyzed. Even in these instances it is difficult at best to

spell out any workable rule susceptible of general application. There are also numerous cases involving property damage, such as those arising out of collision. The rule applicable to such instances possesses greater certainty, and will likewise be discussed for whatever light it may shed upon the present problem.

Perhaps, in the final analysis, the fallacy of the decision below is that it did not pause to define its terms. The Court spoke of "comparative negligence," but it did not seek the definition of this term or appraise the logic of its application in the present case. As the authorities discussed hereinafter will demonstrate, all that the Court below really did was to attempt to solve the problem by applying a simple label to a thick underlay of confusion.

Let us consider the authorities bearing upon the treatment of contributory negligence on the part of a libellant under the general maritime law.

The logical point of departure is the decision of this Court in *The Max Morris*, 137 U. S. 1. In this case the libellant, a longshoreman, was injured by a combination of his own negligence and that of the respondent vessel's personnel. The case reached this Court on a certified question: whether the libellant under these circumstances was entitled to a decree for "divided damages." This question was answered in the affirmative.

In *The Max Morris* this Court observed that it could not ascertain whether the award contemplated below was a result of the equal division of the libellant's damages, or an award of more or less than one-half thereof. However, the Court stated that the libellant's contributory negligence "should not wholly bar recovery," and that "this rule is applicable to all like cases of marine tort, founded upon negligence, and prosecuted in admiralty, as in harmony with the rule for the division of damages in cases of collision."

Obviously the decision in *The Max Morris*, confined as it was within the limits of the certified question, does not

establish any comprehensive rule, and specifically, does not approve the result reached below. Furthermore, whether *The Max Morris* under present circumstances is a logical point of return, as well as a point of departure, is open to serious question. This case was decided in 1890, long before the intervention of the many legislative enactments in the field. Also, to the extent that *The Max Morris* rationalizes its result as being in harmony with the rule in collision cases, it seems inconsistent with the *Halcyon* decision, *supra*, in which this Court noted that it had never expressly applied the collision rule of loss distribution to non-collision cases (at 342 U. S. 284).

In three other instances this Court has made observations concerning the effect of contributory negligence under the general maritime law. The cases in question are *Socony-Vacuum Oil Co. v. Smith*, 305 U. S. 424; *The Arizona v. Anelich*, 298 U. S. 110, and *Beadle v. Spencer*, 298 U. S. 124. In each of these instances, however, the Court was not deciding the case under the general maritime law. Rather, it was deciding solely the availability of assumption of risk, in varying aspects, as a defense to a seaman's claim under the Jones Act.

The *Smith* case says, in passing, that assumption of risk in admiralty must be applied "in conjunction with the established admiralty doctrine of comparative negligence . . ." (at 305 U. S. 431).

The *Anelich* case says only that before the Jones Act "contributory negligence was ground for mitigation of damages in suits brought by seamen to recover for injuries attributable to defective equipment" (at 298 U. S. 122).

In *Beadle*, this Court observed that "contributory negligence is not a defense to a suit brought either under the Jones Act or under the maritime law for injuries attributable to negligently defective equipment. Under both it is ground only for apportionment of the damage . . ." (at 298 U. S. 131).

It is evident that the actual decisions in these cases cannot govern the present case, for the Jones Act does not apply to the class of maritime employees to which Hawn belongs. It is equally evident that in none of these instances was this Court attempting to expound any definitive rule as to classes of cases beyond the purview of its decision. In using the expression "comparative negligence" in the *Smith* case, which was seized upon by the Court below in support of its rule, and in employing the language quoted above from the *Anelich* and *Beadle* cases, all that the Court was doing was explaining the philosophy underlying the Jones Act. Furthermore, from the context of these remarks, it is apparent that they were intended to refer only to seamen. This conclusion is further compelled by the authorities cited in each instance by this Court, each of which will be discussed briefly hereinafter.

Since the Court below placed its main reliance in the *Smith* case, which construed the Jones Act, it may be helpful from the sole standpoint of definition of terms to observe what is contemplated by the legislative scheme of loss distribution incorporated in the Jones Act, sometimes referred to as "comparative negligence."

The Jones Act incorporates by reference § 3 of the Federal Employers' Liability Act, 35 Stat. 66, 45 U. S. C. § 53, which provides that in actions brought thereunder to recover damages for personal injuries

> ". . . the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee . . ."

Although the literal language of the statute might tend to indicate that this rule contemplates the simple matter of deducting a percentage representing the plaintiff's negligence from the total damages, this is not its basis or purpose.

". . . the statutory direction that the diminution shall be 'in proportion to the amount of negligence attributable to such employee' means . . . that, where the causal negligence is partly attributable to him and partly to the carrier, he shall not recover full damages, but only a proportional amount bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both . . ." *Norfolk & Western Ry. v. Earnest*, 229 U. S. 114, 122.

In other words, this Court points out that the defendant pays in accordance with the proportion of fault which he contributed to the casualty. The "comparative negligence" theory of the Jones Act does not mean that, as in the rule below, the defendant pays according to his own fault plus that of another. The Jones Act, applying as it does solely to a suit as between the seaman and his employer, reaches a result consistent with its purpose by the deduction of a percentage representing the plaintiff's fault; but when one attempts to transpose this simple device to a case which embraces the fault of more than two parties, the fallacy is evident. Even if it be assumed, *arguendo*, that the Court below was warranted in "borrowing" the Jones Act rule, which it was not, nevertheless it is clear from the analysis of that rule made by this Court, quoted above, that the Court below borrowed it on its own terms, and not those of the lender.

For purposes of analysis, let us now examine the authorities cited on the relevant point in the *Smith*, *Anelich*, and *Beadle* cases. These are all seamen's cases, and we offer them not for the purpose of demonstrating that they govern the present case, which they do not, but rather for the purpose of analyzing the origin of the language employed by this Court which was, in turn, borrowed by the Court below to fortify its own rule.

In *The Wanderer,* 20 Fed. 140 (1884), the Court stated that an award to a contributorily negligent libellant would have to be based upon "the exercise of sound discretion . . ." to "give or withhold damages according to principles of equity and justice considering all the circumstances of the case" (at 20 Fed. 143). Actually, the Court awarded nothing, but indicated that it would have awarded the expenses of the seaman's maintenance and cure, had they been proved.

In *Olson v. Flavel,* 34 Fed. 477 (1888), the Court reiterated substantially the basis of decision quoted above, but compensated the seaman for "loss of his time" caused by his injury. The Court awarded wages in the sum of $200.00 as against a $1200.00 claim.

We come now to two cases decided by Judge Addison Brown. In the *Frank and Willie,* 45 Fed. 494 (1891), the Court said that a contributorily negligent seaman—libellant is entitled to recover "something" (at 45 Fed. 495). Damages in the sum of $400.00 were awarded, upon what basis we cannot ascertain. In *The Julia Fowler,* 49 Fed. 277 (1892), Judge Brown said that the case of the contributorily negligent seaman fell "within the principles of *The Max Morris*" (at 49 Fed. 279). Again the Court awarded $400.00, but there is no way of telling how the award was computed or precisely how the Court construed *The Max Morris.*

John A. Roebling's Sons Co. v. Erickson, 261 Fed. 986 (C. A. 2, 1919), was an action at law in which the Court, in remanding the case for a new trial for other reasons, said that "The negligence of the seaman [in a case where an unseaworthy appliance contributed to his injury] does not prevent his recovery, but may be taken into consideration . . . in determining the extent of indemnity which he should receive" (at 261 Fed. 987). How the factor of contributory negligence should be "taken into consideration" is neither discussed nor suggested.

Cricket S. S. Co. v. Parry, 263 Fed. 523 (C. A. 2, 1920) was another action at law in which the Court (at 263 Fed. 526) approved a charge "reducing the recovery to an extent proportionate with the extent of plaintiff's fault" as being "in strict accordance" with the *Erickson* case, *supra*. It is noteworthy that in the *Parry* case the Court distinguished various longshoremen's cases looking the other way, and pointed out that it was concerned only with the rights of seamen, "who have constituted from early times a peculiar class" (at 263 Fed. 526).

In *Storgard v. France & Canada S. S. Corp.*, 263 Fed. 545 (C. A. 2, 1920), likewise an action at law, the Court in remanding the seaman's case for a new trial on other grounds incidentally disapproved a charge that contributory negligence bars recovery. The Court merely indicated that contributory negligence was "an element which may be considered in determining what the amount of indemnity should be" (at 263 Fed. 547). How this element was to be considered is not indicated.

In *Panama R. Co. v. Johnson*, 289 Fed. 964 (C. A. 2, 1923, upholding the constitutionality of the Jones Act), the Court, by way of explaining the philosophy underlying the Jones Act, said that "in the admiralty the award of damages always rests in the sound discretion of the court under all the circumstances. So that in cases of contributory negligence the admiralty court grants damages, if it appears to it that to do so is in accordance with principles of equity and justice" (at 289 Fed. 976). Nothing more definitive was offered.

So much for the authorities cited in *Smith*, *Anelich*, and *Beadle*. We turn now to a consideration of representative admiralty cases involving a claim asserted by a contributorily negligent libellant other than a seaman. These cases likewise bespeak an absence of any established rule. The best they can offer is a choice from among a number of "rules" which are to a large extent mutually inconsistent both in theory and in application.

The Explorer, 20 Fed. 135 (1884), was an action by a contributorily negligent longshoreman. The Court held that "in cases of marine torts it is the rule of the courts of admiralty to exercise 'a conscientious discretion to give or withhold damages upon enlarged principles of justice and equity' ". After quoting from Justice Story in *The Marianna Flora*, 11 Wheat. 54, "A party who is *in delicto* ought to make a strong case to entitle himself to general relief", the Court went on to confess that it "cannot accurately and will not undertake to discriminate between [the parties] as to the extent of the negligence of each and the share of the result produced by each . . ." (at 20 Fed. 139). The Court ultimately awarded only the libellant's "expenses", which included his wages during hospitalization and the admission charge to the hospital (at 20 Fed. 140).

In *Anderson v. The Ashebrooke*, 44 Fed. 124, the Court approved an otherwise undefined "division" of damages in a suit by a contributorily negligent longshoreman.

The Serapis, 49 Fed. 393, was a suit by a contributorily negligent stevedore against his employer-shipowner. The Court held that "Contributory negligence does not of itself necessarily bar recovery, but leaves the Court at liberty to apportion the damages upon principle of equity, and to hold the ship-owner liable for part of the employee's pecuniary loss" (at 49 Fed. 396). Thereupon the Court "divided" the damages and awarded one-half thereof to the libellant (at 49 Fed. 398).

In *The Saratoga*, 87 Fed. 349, the Court held that under "the peculiar principles applicable to cases of this nature in admiralty, an apportionment of the damages must result" (at 87 Fed. 361). The award was for half of the Libellant's damages.

In *The Steam Dredge No. 1*, 134 Fed. 161 (C. A. 1, 1904), the Court "apportioned" the contributorily negligent

longshoreman's damages and awarded him half thereof, stating that it was following the rule in cases of collision.

Pioneer S. S. Co. v. McCann, 170 Fed. 873 (C. A. 6, 1909) looks away from any formula of apportionment in accordance with fault. The Court there observed that "under the evidence, . . . the fault of the shipowner here was greater in degree than that of the libelant". Nevertheless, the Court affirmed the decree below on the ground that it was "satisfied" that the award "was not more than one-half the damages libelant suffered . . ." (at 170 Fed. 880).

Two cases from the following decade likewise espouse the rule of "divided", or half damages. In *The Granville R. Bacon*, 229 Fed. 715 (1916), the Court of Appeals for the Fifth Circuit awarded "divided" damages, saying that it was following *The Max Morris* in so doing. In *The Wilhelmina*, 232 Fed. 430 (1916), the same Court again awarded half damages to a contributorily negligent longshoreman without discussing the basis of the award.

Turning to several of the more recent cases (which, with the exception of the *Guerrini* case, were cited by the Court below) let us consider first *Kreste v. United States*, 158 F. 2d 575 (C. A. 2, 1946). In reversing a decree and remanding for a new trial, the Court of Appeals for the Second Circuit said that if the trial judge found the Libellant negligent, "he should apportion the damages" (at 158 F. 2d 580).

Palardy v. United States, 102 F. Supp. 534 (E. D. Pa. 1952) was an action in admiralty by a longshoreman in which the respondent shipowner impleaded the libellant's employer. In point of fact, the Court found the impleaded respondent free from fault. As between the libellant and respondent, the Court found that the libellant's negligence contributed to his injury to the extent of 25% and reduced the amount of his damages accordingly, ". . . in accordance with the admiralty rule of comparative negligence. . . ." (citing the *Smith* case, at 102 F. Supp. 539).

Badalamenti v. United States, 67 F. Supp. 575 (S. D. N. Y., 1946; modified on other grounds, C. A. 2, 160 F. 2d 422) deserves more than passing attention, for it is an excellent illustration of the prevalent confusion in thinking and terminology.

In *Badalamenti*, the Court purported to approve, *seriatim*, the doctrines of (1) "mitigation" of damages; (2) "comparative negligence"; and (3) the "admiralty rule of the division of damages, in cases of collision, where both vessels are in fault . . ." as being "applicable to all cases of marine tort, founded upon negligence and prosecuted in admiralty" (at 67 Supp. 580).

Notwithstanding its approval of the comprehensive application of the collision rule of divided damages, the Court found that the libellant was 20% responsible for his own injuries and assessed 80% of the damages against the respondent.

In *Guerrini v. United States*, 167 F. 2d 352 (C. A. 2, 1948) the Court of Appeals for the Second Circuit, in remanding a suit brought by a shoreside worker for a finding vital to the question of the respondent's negligence, said:

> "We hold that if the [trial judge] supplies the [necessary finding from which negligence would follow] the faults will be in the proportion of one to four and a decree will be entered for one fourth of the award which he made" (at 167 F. 2d 356).

Thus the rule of the *Guerrini* case seems to be that one ascertains the proportions of the respective faults of the respondent and libellant, converts the proportions into a fraction whose numerator is the proportion of the respondent's fault, and whose denominator is the proportion of the libellant's fault, and awards the libellant that fractional portion of his damages.

Let us pause for a moment to observe the distinct difference between the methods of computation approved in *Guerrini* and *Badalamenti*. The difference is much more

than a nuance of terminology. In *Guerrini*, where the respective faults of respondent and libellant were in the proportion of one to four, the respondent was said to be liable for one-fourth, or 25% of the damages. The exact converse was true in *Badalamenti*, where the respective faults of respondent and libellant were in the ratio of four to one. However, *Badalamenti* holds the respondent liable for 80% of the damages, whereas it would logically follow from the *Guerrini* result that he would be liable for 75% in the circumstances.

Possibly the *Guerrini* rule was announced inadvertently, for it becomes more patently illogical, followed to its conclusion, as the disparity between the respective faults decreases in proportion. When, for instance, the fault of the respondent and that of the libellant are in the proportion of one to two, it does not make sense to hold the respondent for one-half the damages. And, when the faults are equal, in the ratio of one over one, can it be that the respondent must pay full damages?

In any event, do not the foregoing cases reveal what a perplexing assortment of tools is handed to the practitioner?

Obviously a review of all of the authorities extant is beyond the scope of any one brief, and, we are sure beyond the reasonable endurance of the reader. Hence we have confined the foregoing analysis to those lower court cases cited by this Court in the *Smith*, *Anelich* and *Beadle* decisions, and those cited by the Court below as establishing the rule governing the effect of contributory negligence upon recovery under the general maritime law. These were all cases involving only two party fault. To these we added several other representative cases involving libellants other than seamen. One would expect that, if anywhere, some semblance of a definite rule would appear in the numerically simple situation involving only two parties. Yet the fact is that out of the twenty cases considered, at least seven different "rules" emerge:

1. Contributorily negligent libellant's recovery is measured by principles of equity and good conscience, etc.: *The Wanderer, Olson v. Flavel, Panama R. Co. v. Johnson, The Explorer.*

2. Contributorily negligent libellant can recover "something": *The Frank and Willie.*

3. Contributory negligence is a factor which "may be taken into consideration" in measuring the recovery: *John A. Roebling's Sons Co. v. Erickson, Storgard v. France & Canada S. S. Corp.*

4. Contributorily negligent libellant can recover half damages: *Anderson v. The Ashebrooke, The Serapis, The Saratoga, The Steam Dredge No. 1, Pioneer S. S. Co. v. McCann, The Granville R. Bacon, The Wilhelmina.*

5. Libellant's recovery is reduced by the percentage or proportion representing his own fault: *Cricket S. S. Co. v. Parry, Badalamenti v. United States, Palardy v. United States.*

6. Respondent pays libellant a fraction of his damages whose numerator is the proportion of fault contributed by respondent, and whose denominator is the proportion contributed by libellant: *Guerrini v. United States.*

7. Vagueness precludes descriptive classification: *Kreste v. United States; The Julia Fowler.*

There is a relative paucity of authorities dealing with the effect of contributory negligence in a case where, as here, more than two parties, including the injured party, were found to be at fault.

In *The S. S. Samovar*, 72 F. Supp. 574 (N. D. Cal., 1947) the Court said: "since there was no negligence on the part of libelant . . . there is no occasion to *divide* the damages," citing, inter alia, *The Max Morris, supra* and *The Steam*

Dredge No. 1, supra (at 72 F. Supp. 591; emphasis supplied). This was, of course, dicta and the ultimate holding, which made various adjustments of the loss among several respondents upon principles of contribution appears erroneous in the light of the *Halcyon* decision.

In *Portel v. United States*, 85 F. Supp. 458 (S. D. N. Y., 1949) the Court found that the libellant's own fault causally contributed to his injuries to the extent of 25%. Of the remaining fault, the respondent and the impleaded respondent as between themselves were found to be accountable in the ratio of 40% and 60%. Accordingly, the Court simultaneously awarded libellant 75% of his damages, and decreed that the impleaded respondent should pay the respondent 60% of what the latter had to pay libellant, this adjustment being made on the basis of contribution. Again, the holding in this case is questionable in view of *Halcyon*.

Read v. United States, 201 F. 2d 758 (1953) was decided by the Court below subsequent to the present case. In *Read*, the libellant sued the shipowner, who impleaded libellant's employer and also the prime contractor on the job on which Read was injured. The Trial Court found that libellant's own negligence was 50% responsible for his injuries. No finding was made as to the percentages of fault contributed by the other parties. However, the Trial Court allowed the respondent contribution from libellant's employer to the extent of the latter's obligations under the Harbor Workers' Act, and permitted the respondent to recover the deficiency between such sum and the total award from the prime contractor.

Halcyon having intervened during the pendency of the *Read* appeal, the Court of Appeals set aside the judgment of contribution in favor of the respondent and against the libellant's employer. However, since the respondent had been held liable in the first instance on the ground of unseaworthiness, a species of liability without fault, the Court

awarded the respondent full indemnity from the prime contractor since the latter's negligent breach of its contract with the respondent had produced the unseaworthiness.

All that the *Samovar*, *Portel* and *Read* decisions do is to point up the impact of the *Halcyon* decision upon the case at bar. The *Read* case also raises questions as to the significance of qualitative differences in fault in the overall scheme of loss distribution. Undoubtedly the pre-*Halcyon* assumption in many quarters that contribution was allowable as between joint tort feasors must necessarily have influenced the basic approach which the Courts took to the whole problem of loss distribution in maritime personal injury cases. Now that *Halcyon* has intervened so as to affect the rights of tort feasors *inter se*, and commended that problem to Congress, it is even more apparent that similar treatment should be accorded the problems raised as between an injured party at fault and tort feasor subject to liability in multiple party cases. While perfect symmetry may not be absolutely essential, some degree of integration is, to say the least, obviously desirable.

For the sake of completeness, brief mention must be made of the maritime rule of loss distribution in property damage cases—principally those arising out of collision between vessels. We are mindful in so doing that the permissibility of applying the doctrine in such cases to other types of casualties is open to serious question in view of *Halcyon*. However, reference to this body of law may be helpful from the standpoint of understanding alone since, as we have seen, it has frequently been drawn upon for support in the cases involving personal injury.

As this Court observed in *Halcyon*, the established admiralty doctrine is that where two vessels collide due to mutual fault, the mutual wrongdoers share equally the damages sustained by each, as well as personal injury and property damage inflicted on innocent third parties (at 342 U. S. 284). What is probably more important for present

purposes is the rule where more than two vessels are at fault. In this instance, the rule is still equal division of damages as among all the participants—into thirds, in the case of three-party fault. *The S. A. McCaulley*, 116 Fed. 107; *The Coamo*, 267 Fed. 686; *The Elmhurst*, 78 F. 2d 536.

One step removed from the collision cases, and probably one step closer to the present problem, is the situation of maritime property damage arising out of negligence unconnected with collision. The Court of Appeals for the Second Circuit had this problem before it quite recently in *W. E. Hedger Transportation Corp. v. United Fruit Co.*, 198 F. 2d 376, cert. den. 344 U. S. 896. The jury found that both plaintiff and defendant were at fault. The Court of Appeals, in applying the maritime rule, held that the plaintiff was entitled to judgment for one-half of his damages. The possibility of applying any other "maritime rule" was not discussed, and apparently not raised.

This, then, is the state of the general maritime law. Nothing we could say would emphasize the obvious—that it is in a badly confused and indefinite state on the general problem of loss distribution in personal injury cases, and in particular, *it offers no definitive rule governing the case at bar*. Other conclusions are not easy to draw. Any party, or any Court which undertakes to pluck a definitive rule from among this mass of conflicting and frequently indefinite authorities must necessarily be working from doubtful premises.

If any general observations may be made as to what rules govern the effect of contributory negligence upon recovery under the general maritime law, they are these:

(1) In two-party cases, there is probably more support, numerically speaking, for the rule of equal division of damages than for any other rule.

(2) The more recent two-party cases indicate a tendency to assess the respondent in an amount diminished by the percentage of fault contributed by the

libellant. The influence of the Jones Act has apparently been felt.

As to (1) above, the logical application of the equal division rule to a case involving three-party fault may well be questioned. If this rule has its origin in the collision rule, then by analogy the collision rule in three-party cases might well apply—i.e., each party should be held accountable for one-third of the total damages. The difficulty of applying this latter formula arises where, as here, one of the parties (Haenn) is insulated by law from direct liability to the injured party, thus rendering Haenn's "one-third share" uncollectible by Hawn in the present proceedings. Here again is evidence of the inevitable entanglement of the present problem with the Harbor Workers' Act.

As to (2) above, we have already developed the proposition that no Court is warranted in borrowing a statutory scheme of loss distribution enacted by Congress for the benefit of seamen alone, and applying it to an entirely different class as to whom Congress has likewise legislated extensively, and not seen fit to apply the plan which it applied to the former. Beyond that, as we have also seen, the essence of the Jones Act "plan" is that the defendant *pays in proportion to the fault which he contributed.* In a case of two-party fault the same *result* may be described in terms of deducting the percentage of the plaintiff's fault from his total damages. But the fatal error in application of the *principle* is committed in a case of three-party fault if the rule is cast in terms of the *result* in a two-party case. Thus, all other considerations aside, if the Court below thought that it was applying the rule of "comparative negligence" in the Jones Act sense, it was mistaken. It made Pope & Talbot pay for Haenn's fault, as well as its own.

The great doubt which surrounds the ascertainment of any clear-cut "rule" in the two-party cases renders even more speculative the attempted formulation of a rule in cases of three-party fault. That the rule fashioned below

is not the established admiralty doctrine is clear. That this Court has never even intimated approval of it, or of any other definitive rule, is also clear. Simply calling it "comparative negligence," without more, evades the problem completely. The opinion below demonstrates the fallacy of dealing in labels—particularly indefinite ones.

Undoubtedly, as this Court observed in *Halcyon*, Courts exercising jurisdiction in maritime affairs possess a certain freedom to fashion rules at variance with the common law. But the recognition of the power to do so does not imply approval of its unfettered exercise, nor uncritical acceptance of the consequences thereof. It transgresses the permissible bounds of a Court's freedom to relieve a party from the burden of a complete common law defense, and in so doing, to make him accountable solely for his own fault, while at the same time compelling his adversary to bear the burden of another's fault, as well as his own. That, in essence, is the decision below. The fundamental reason why it offends is that it falls far short of the criterion for acceptance recognized in *Halcyon*—namely, it leaves one a great deal less than "wholly convinced that it would best serve the ends of justice." (at 342 U. S. 285).

This fact, and the equally important consideration discussed at the outset—that by the very fact of its announcement, any rule in this instance impinges upon a comprehensive statutory scheme, and significantly affects many diverse interests whose views deserve thorough legislative scrutiny—point to two conclusions:

1. The rule below cannot stand.

2. This is not a situation permitting the approval or announcement of any other rule.

Ancillary to the second conclusion, but not essential to its validity, is the fact which is evident from the authorities previously analyzed: as of the pendency of the present decision, there is no established, definitive rule of the admiralty applicable to the facts of this case.

If these conclusions are sustained, then, all other considerations aside, there is no admiralty rule at variance with the common law as to the effect of contributory negligence upon recovery under the facts of the present case. That being so, the only alternative is to apply the common law rule, as in *Halcyon*, and the result must be that Hawn's contributory negligence bars recovery. That ends the case, and the second and third questions presented by the present petition become moot.

Even if this Court should agree that the rule below represents the admiralty doctrine, or if this Court should hold that some other rule is applicable to like cases in admiralty, by no means does it follow that the admiralty rule properly governs the case at bar. We now address ourselves to this proposition.

3. EVEN IF THIS COURT SHOULD HOLD THAT THERE IS A RULE IN COURTS OF ADMIRALTY APPLICABLE IN A SIMILAR CONTROVERSY, WHICH RULE IS AT VARIANCE WITH THE COMMON LAW RULE THAT CONTRIBUTORY NEGLIGENCE BARS RECOVERY, SUCH RULE DOES NOT GOVERN THIS CASE. IN ELECTING TO MAINTAIN HIS ACTION AT LAW IN THE DIVERSITY COURT IN PENNSYLVANIA, WITHIN WHOSE TERRITORIAL WATERS THE TORT WAS COMMITTED, HAWN IS BOUND TO ACCEPT THE CONSEQUENCES OF HIS ELECTION. ONE OF THESE CONSEQUENCES IS THAT THE EFFECT OF CONTRIBUTORY NEGLIGENCE MUST BE DETERMINED BY THE LAW OF PENNSYLVANIA, UNDER WHICH CONTRIBUTORY NEGLIGENCE BARS RECOVERY. THE DIVERSITY COURT WAS NOT AT LIBERTY TO DISREGARD THE PENNSYLVANIA LAW AND APPLY THE RULE OF THE ADMIRALTY COURTS.

The fundamental issue underlying this point is: Does the grant of jurisdiction to the admiralty courts to hear and determine a controversy arising on navigable waters carry with it the power in the admiralty courts to create

rules of decision which must be enforced by courts of law in a state upon whose territorial waters the tort occurred, whose jurisdiction to hear and determine the same controversy is likewise unchallenged?

The answer is no.

The subsidiary question is whether in determining such controversy, a federal diversity court sitting in the aforementioned state may choose the admiralty rules of decision in preference to the rules of decision of the courts within that state.

The answer to this question is likewise no.

We are not here concerned with the extent of the residual power in Congress to resolve the controversy by prescribing substantive rules by legislative enactment, or with the effect which would have to be given to such Congressional command by court of admiralty and court of law alike. Nor are we concerned with the possible impairment of the jurisdiction residing in either court. Hawn had his choice between invoking the jurisdiction of the court of admiralty and the court of law, and he chose the latter.

Hawn invoked the jurisdiction of the District Court on the ground of diversity of citizenship. The Court was sitting in Pennsylvania, in whose territorial waters the tort giving rise to the cause of action was committed. Under Pennsylvania law, contributory negligence, however slight, bars recovery in personal injury suits. *Fordyce v. White Star Bus Lines*, 304 Pa. 106; *Parris v. John B. Kelly, Inc.*, 321 Pa. 78; *Glancy v. Meadville Bread Co.*, 340 Pa. 452. Although no Pennsylvania case has to our knowledge decided the effect of contributory negligence in a personal injury suit based upon maritime tort, in other instances of tort committed upon navigable waters Pennsylvania has approved the rule that contributory negligence bars recovery in an action at law. *Simpson v. Hand*, 6 Wharton 311; *Brown v. Gilmore*, 92 Pa. 40, affd. on other grounds, 102 U. S. 118.

In this setting, the decision of this Court in *Caldarola v. Eckert*, 332 U. S. 155, is dispositive of the question as to the substantive body of law to be applied in determining the effect of contributory negligence upon recovery. Under *Caldarola*, it is clear that the law of Pennsylvania governs.

Caldarola, an employee of a stevedore contractor, was injured while working aboard a vessel docked at a pier in New York City, just as Hawn in the present case was injured while working aboard a vessel docked at a pier in Philadelphia. "Presumably to obtain the benefit of trial by jury"[1] Caldarola sued at law in the New York court, just as Hawn in the present case, presumably for the same reason, sued at law in the District Court.

This Court recognized that Caldarola's claim involved a maritime tort. It also recognized that, as in the present case, it was suable at law by virtue of § 9 of the Judiciary Act of 1789 which saved "to suitors in all cases the right of a common-law remedy where the common law is competent to give it."[2] In the view of this Court, it was immaterial whether the "saving" clause recognized that there were common law rights in the States as to matters also cognizable in admiralty, or whether Congress was concerned only with "saving" to the States the power to use their courts to vindicate rights deriving from the maritime law to the extent that their common law remedies may be available —"a question on which the authorities do not speak with clarity" (at 332 U. S. 157).

> ". . . In any event, whether New York is the source of the right or merely affords the means for enforcing it, her determination is decisive that there is no remedy in its courts for such a business invitee

1. At 332 U. S. 157.

2. Reenacted June 25, 1948, 28 U. S. C. § 1333, as amended May 24, 1949, to read, in relevant part, "saving to suitors in all cases all other remedies to which they are otherwise entitled."

against one who has no control and possession of premises. Compare Douglas v. New York, New Haven & Hartford R. Co., 279 U. S. 377, and Testa v. Katt, 330 U. S. 386.

"The New York Court of Appeals authoritatively determines who is liable, in New York, for such an occurrence as that of which Caldarola complainant [sic]. Insofar as the issues in this case exclusively concern New York law, that court had the final say in holding that one in the relation of the respondents to the petitioner is not liable for the tort of which the latter complains . . ." (at 332 U. S. 158).

The only issue in the *Caldarola* case which was held not to be concluded by New York law was the interpretation of a contract of general agency between the defendant and the United States. This issue alone was held to be a matter of "federal concern", and was viewed as relevant only to the extent that its resolution would tend to establish whether the agent had the kind of control of the vessel *required by New York law* as a basis of liability to third persons (at 332 U. S. 158). This Court held that the agency contract did not create in the defendant the type of "control" required by New York law to make it liable to a person such as Caldarola who was injured on the premises. Accordingly it was held that Caldarola had not established a cause of action under New York law, and recovery was denied.

If the substantive law of a State within whose territorial waters a tort occurs determines, in an action at law, the circumstances under which a cause of action arises, so must it determine the circumstances under which it can be defeated. The separation of these two interrelated concepts is logically impossible. One cannot differentiate between the kind of control required by a state to produce liability, and the kind of conduct on a plaintiff's part required by a state to sustain recovery.

Mr. Justice Rutledge raised the sole dissenting voice in *Caldarola* as to the substantive law applicable apart from the construction of the agency contract. In his view, New York law had "nothing to do with creating or nullifying" Caldarola's "substantive right". He believed that since the liability arose from a maritime tort, it "is a creature of federal law in its entirety, not of state law" (at 332 U. S. 164). He regarded the case "as being controlled in its substantive aspect altogether by federal law" and observed that "the federal maritime law . . . well might hold responsible to an injured longshoreman one who has knowledge that such persons will come aboard and who undertakes to keep the vessel and its equipment in safe condition for their use" (at 332 U. S. 165).

In essence, the view of the Court below is in accord with Mr. Justice Rutledge's dissent. The Court below says that Hawn started his action in the federal court on his "maritime claim". Accordingly, the Court refused to "permit the state doctrine" as to the effect of contributory negligence to "supersede" the "strictly federal principle" which it believed contrary to the state law in this respect (R. 240-241).

The distinction attempted to be drawn by the Court below between *Caldarola* and the present case is patently untenable. The Court below says that *Caldarola* turned on "whether it was the state of New York's duty to accept the federal claim involved, not on whether a state statute controlled and thus wiped out a fundamental admiralty right" (R. 240).

This distinction is at once confused and confusing, for it is premised in terms of dissenting Mr. Justice Rutledge's view of the source and nature of the claim, and because there is no state statute involved here. For that matter, no statute, state or federal, prescribes the rules of decision in this case. It is simply a question of which set of judge-made rules governs.

Passing these doubtful premises, what the Court below is apparently trying to draw is a distinction between "acceptance" of a claim, and the choice of substantive rules which determine the claim once it has been "accepted". Whether there is such a distinction is beside the point for present purposes, for the state court in *Caldarola*, and the diversity court in this case, both took jurisdiction of the respective claims and proceeded through adjudication. *The relevant point is that in Caldarola this Court approved and reaffirmed New York's determination of the issues* (except that it reexamined the agency contract issue) *on the basis of the substantive law of New York.*

The logical analogy between *Caldarola* and the present case is complete. The factual analogy is likewise complete, except in one respect—Caldarola sued in the state court, whereas Hawn sued in the diversity court. This difference gives rise to no distinction.

It is difficult to tell what significance the Court below attached to *Erie R. Co. v. Tompkins*, 304 U. S. 64. One thing is certain: It did not follow *Erie*, when it should have. Rather, it concluded, in effect, that this case concerns a federal claim sued on in a federal court, governed by a federal principle. In short, it holds that this case is governed by a species of federal common law—the general maritime law. The net result of its decision is to make the diversity court a forum alternative to the admiralty court, deciding cases arising on navigable waters according to the admiralty law (with trial by jury). And, of course, this forum is available only to suitors who happen to be hurt by a citizen of another state.

This result demonstrates what happens when one attempts to transmute the express exceptions to the *Erie* doctrine—"matters governed by the Federal Constitution or by acts of Congress" (at 304 U. S. 78)—into a general category denominated "federal principle". We are not here dealing with a right granted by Congress, or by the Co sti-

tution. If any "federal right", in the Constitutional sense, were involved; if the right of action were "founded in federal law, as creating the maritime tort" (Mr. Justice Rutledge, dissenting in *Caldarola*, at 332 U. S. 164), then these considerations would be equally relevant in determining the extent to which a state could attach determinative incidents thereto in the first instance. That these premises are unsound is concluded by *Caldarola*.

Clearly the choice of law here is not between some overriding "federal principle" and the state law. The choice is between the rules of decision created by the admiralty court, and those created by the state court. Cf. *Levinson v. Deupree*, — U. S. — (June 1, 1953). Hawn made the choice of the latter when he elected to sue at law in the diversity court. No conflict of jurisdictions exists. Any dissimilarity in results of the possible suits is attributable solely to the exercise of a free choice by the suitor himself.

It is equally obvious that the decision below is in direct conflict with the delineation of the *Erie* doctrine in *Angel v. Bullington*, 330 U. S. 183, wherein this Court said that the *Erie* decision

> ". . . drastically limited the power of federal district courts to entertain suits in diversity cases that could not be brought in the respective State courts *or were barred by defenses controlling in the State courts* . . ." (at 330 U. S. 192; emphasis supplied).

Not only is the right of the Pennsylvania courts to apply their substantive common law rule as to the effect of contributory negligence recognized by *Caldarola*; it is also consonant with the prior expressions of this Court in *Atlee v. Packet Co.*, 88 U. S. 389, and *Belden v. Chase*, 150 U. S. 674.

The *Atlee* case recognizes, albeit by dictum, that the suitor's choice of forum as between admiralty court and court of law makes a significant difference insofar as the effect of contributory negligence is concerned. This obser-

vation was made a rule of decision in *Belden v. Chase*, wherein it was held that contributory negligence bars recovery in an action at law based upon a tort occurring on navigable waters. To our knowledge this Court has never questioned the validity of *Belden v. Chase* on this point.

The *Belden* doctrine was followed by the Ninth Circuit in *Puget Sound Navigation Co. v. Nelson*, 41 F. 2d 356, cert. den. 282 U. S. 869. The Supreme Court of Washington followed *Belden* in *Sea Products Company v. Puget Sound Nav. Co.*, 191 Wash. 276, 71 P. 2d 43, and *Wilkins v. Foss Launch & Tug Co.*, 20 W. 2d 422, 147 P. 2d 524.

The Court below says (R. 240) that the Second Circuit "definitely and finally repudiated" the *Belden* doctrine in *W. E. Hedger Transp. Corp. v. United Fruit Co.*, 198 F. 2d 376, cert. den. 344 U. S. 896. The *Hedger* case was a diversity suit for property damage on navigable waters. The Court applied the admiralty rule of equal division of damages in measuring the recovery of a contributorily negligent plaintiff. The important point for present purposes is, as the Court in *Hedger* noted, that the New York courts would look to the admiralty rule to determine the effect of contributory negligence (at 198 F. 2d 379) whereas, as was previously noted, Pennsylvania courts do not.

Notwithstanding anything the Second Circuit may have said about *Belden* in *Hedger*, and bearing in mind the difference in references between the New York courts and Pennsylvania courts on the specific point of contributory negligence, there is no question where the Second Circuit now stands on the broader underlying issue involved in the present case. In *Gallagher v. United States Lines Company, et al.*, — F. 2d — (July 6, 1953) the Second Circuit applied New York law in setting aside a verdict for the plaintiff longshoreman in a diversity suit arising out of maritime tort allegedly committed on New York territorial waters. In so deciding the Court held that the "only basis under the law of New York, which governs since the accident occurred within that State, for finding a duty on the

part of United toward Gallagher . . . ." (Slip Opinion, p. 1332) was non-existent under the facts of the case.

Thus the diversity court in New York is bound, as was the Court below, to follow *Caldarola v. Eckert* and apply the substantive law of the state within whose territorial waters the tort occurred.

In support of its conclusion that the Pennsylvania law does not govern the effect of contributory negligence the Court below cites four cases decided prior to *Caldarola*. They are *Garrett v. Moore-McCormack Co.*, 317 U. S. 239; *Seas Shipping Co. v. Sieracki*, 328 U. S. 85; *Carlisle Packing Co. v. Sandanger*, 259 U. S. 255 and *Chelentis v. Luckenbach S. S. Co.*, 247 U. S. 372. These cases are not controlling.

Sieracki and *Chelentis* were, in point of fact, cited by this Court in *Caldarola* as evidences of the previously existing lack of clarity among the authorities as to the meaning of the "saving" clause in varying instances (at 332 U. S. 158). *Caldarola* settled the facet of that problem with which we are here concerned. Moreover, *Chelentis*, *Sandanger* and *Garrett* were all seamen's cases. Beyond question, seamen are a favored class. The rights and obligations arising out of their relationship with their vessel are the subject of comprehensive Congressional legislation for their protection. *Isbrandtsen Company v. Johnson*, 343 U. S. 779. The general maritime law has in a real sense simply filled in the interstices of this pattern. It has been developed with a view toward, and subservient to the policy of solicitude prescribed by Congress. Thus the complete body of "seaman's law" is truly an integrated whole, reflecting preeminently a policy expressed by Congress. It is in this light that the cases dealing with seamen's claims must be initially appraised when they are sought to be applied to other classes of controversies.

The *Garrett* case held that the admiralty rules must be applied in determining the validity of a release given by a seaman, which had been set up in defense to a claim for dam-

ages under the Jones Act, and a companion claim for maintenance and cure arising out of the same injuries. The decision turned primarily upon the necessity of uniformity in vindication of rights arising under that Act of Congress. We are not here concerned with rights arising out of an act of Congress. Nor need we quarrel with the proposition that a cause of action for maintenance and cure, which has no counterpart in the substantive law of any state, is properly determined by the law which alone created it. The doctrine is unique in every respect.

Chelentis v. Luckenbach S. S. Co. and *Carlisle Packing Co. v. Sandanger* relied principally upon the doctrine announced in *Southern Pac. Co. v. Jensen*, 244 U. S. 205, to the general effect that state legislation was invalid to the extent that it contravened an express Congressional purpose, or worked prejudice to or interfered with the harmony or uniformity of the general maritime law in its international and interstate relations. The 5 to 4 decision in *Jensen* commenced a heated controversy engendered, no doubt, by the powerful dissents written by Justice Holmes and Justice Pitney. The controversy culminated in *Standard Dredging Corporation v. Murphy*, 319 U. S. 306, where this Court recognized that the doctrine "has no vitality beyond that which may continue as to state workmen's compensation laws" (at 319 U. S. 309).

For present purposes it is worth noting that the decline of the *Jensen* doctrine was marked by cases such as *Grant Smith-Porter Ship Co. v. Rohde*, 257 U. S. 469; *Just v. Chambers*, 312 U. S. 383; *Davis v. Department of Labor*, 317 U. S. 249 and *Parker v. Motor Boat Sales Co.*, 314 U. S. 244, which developed the so-called "maritime-but-local" doctrine which recognized that many controversies arising on navigable waters are matters of legitimate local concern. Indeed, we have concrete evidence of the recognition of this same fact by Congress with respect to the most grievous personal injury—death.

In 1920 Congress passed the Death on the High Seas Act, creating a cause of action for wrongful death occurring thereon. 41 Stat. 537, 46 U. S. C. § 761 et seq. Here it had an opportunity to declare, in effect, that the incidents of that tort, when occurring on waters within the territorial limits of a state, were a matter of national concern. Yet the significant thing is that the Death on the High Seas Act expressly excepts from its operation wrongful deaths occurring, inter alia, on waters within the territorial limits of any state. Section 7. It leaves unaffected the provisions of any state statute giving or regulating such an action. This repels any suggestion that the application of state law to personal injuries occurring on the navigable waters of a state in any way contravenes any overriding legislative policy of the federal government.

Conclusions as to the First Question Presented.

1. There is no established rule of the admiralty governing the effect of contributory negligence upon recovery under the facts of this case. Nor, in accordance with *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282, is this an occasion for the approval or announcement by this Court of any admiralty rule at variance with the common law, under which contributory negligence bars recovery.

2. Even if this Court should hold that there is existing an applicable rule in the admiralty, or announce a rule which would be applicable had this suit been brought in admiralty, nevertheless such rule does not apply to the present case. For the reasons discussed hereinabove, the diversity court was bound to apply the substantive law of Pennsylvania in determining the effect of Hawn's contributory negligence upon his recovery. Accordingly, he cannot recover in the present suit.

If either of the foregoing conclusions be sustained, Pope & Talbot is entitled to have judgment entered in its

favor, and against Hawn. In that event, the second and third questions presented by the present writ do not require consideration.

Second Question: Whether Haenn Is Entitled, in Effect, to Indemnify Itself at Pope & Talbot's Expense.

SHOULD THIS COURT DECIDE THAT HAWN IS ENTITLED TO RECOVER FROM POPE & TALBOT, AND SHOULD THIS COURT FURTHER MEASURE HAWN'S RECOVERY BY ANY STANDARD WHICH DOES NOT EXCLUDE IN ITS COMPUTATION THE QUANTUM OF FAULT CONTRIBUTED BY HAENN, POPE & TALBOT IS ENTITLED TO HAVE HAWN'S JUDGMENT AGAINST IT DIMINISHED TO THE EXTENT OF THE COMPENSATION PAYMENTS AND MEDICAL EXPENSES WHICH HAENN WAS OBLIGED TO PAY TO HAWN, OR ON HIS BEHALF, UNDER THE HARBOR WORKERS' ACT.

Hawn's employer, Haenn, had made payments aggregating $5,881.35 to Hawn, or on his behalf, under the Harbor Workers' Act. The stipulated limit of Haenn's liability to Hawn under the Act is $8,331.35 (R. 202a). Under an agreement to which Pope & Talbot is not a party, Hawn is to repay Haenn the sums which Haenn paid him out of his recovery against Pope & Talbot (R. 202a).

Hawn's damages were assessed by the jury under a charge which instructed them to include past loss of wages and medical expenses in computing the recovery (R. 156a). If Hawn were permitted to retain this recovery, in addition to the compensation received from his employer, he would be obtaining a double recovery. Hawn did not urge his entitlement thereto, nor does the Harbor Workers' Act permit an employee to retain both compensation from his employer and damages from responsible third parties. *The Etna*, 138 F. 2d 37 (C. A. 3.); *Fontana v. Grace Line*, 106 F. Supp. 461, affd.—F. 2d—(C. A. 2, June 22, 1953).

If, on the other hand, the injured employee reimburses his employer for compensation act payments out of his recovery against the third party, no injustice is worked—provided the employer's own fault did not contribute to his employee's injury. But here the jury found both Haenn and Pope & Talbot at fault. The decision below permits the negligent employer, although insulated by *Halcyon* from liability for contribution to the shipowner, to secure full indemnity from the shipowner, with the employee the conduit for recovery.

The Court below rejected Pope & Talbot's contention that Hawn's recovery against it be reduced by the sums paid by Haenn to Hawn under the Harbor Workers' Act. In so doing, the Court judicially amended the Act in a manner neither permitted nor required by the *Halcyon* decision. At the same time, it construed the Harbor Workers' Act on a fundamental point in a manner inconsistent with the purpose of the Act.

Nothing in the Harbor Workers' Act contemplates the result reached below. The Act provides for subrogation in the employer in one instance alone: where payment of compensation had been accepted by the employee under an award made in a compensation order filed by the Deputy Commissioner following adversary determination of the employee's rights. In these circumstances, the employee's right of action against the third party passes to the employer, who repays himself out of the proceeds of his suit against the third party. § 33, 33 U. S. Code § 933.

Under no other circumstances does the Harbor Workers' Act provide for subrogation in favor of the employer. Where the employer's own fault was not involved in the casualty, it has been held that he is entitled to subrogation to his employee's recovery, *under equitable principles*. *The Etna*, supra, 138 F. 2d 37. Indeed, the Court below in the *Halcyon* case (*sub nom. Baccile v. Halcyon Lines*, 187 F. 2d 403) recognized that the employer's own fault and subrogation seem inconsistent even in those instances provided for

by the Act, where the employee's right of action passes to the employer by virtue of an award. In discussing the statutory sanction for "the employer's independent right to repay to himself out of his recovery as assignee the compensation already paid to his employee", the Court observed: "But this is in accordance with accepted principles (citing *The Etna*), *to the extent that the employer's own fault is not involved*" (at 187 F. 2d 405; emphasis supplied).

Until the present decision no Court has to our knowledge held or suggested that a negligent employer possesses a right to subrogation where it is not recognized by the statute or justifiable upon any other principle, equitable or otherwise.

The Court below viewed Pope & Talbot's present contention as an attempt to force Haenn's contribution to Hawn's judgment against Pope & Talbot. That is one way of looking at it. The other way, equally logical, is to view Pope & Talbot's contention as going to the more fundamental problem of the correctness of the amount of the judgment in the first instance. That is, the jury based its award, inter alia, upon past loss of wages and medical expenses. To the extent that those items of damage proved had been covered by Haenn's compensation payments, they had not in fact been sustained by Hawn. Yet Pope & Talbot would not have been permitted to prejudice Hawn's claim against it by mentioning "compensation" to the jury. Therefore, to the extent that the jury's verdict paid Hawn for those items actually paid by Haenn under the Harbor Workers' Act, the verdict was in contemplation of law and in fact excessive.

Passing that fact, let us consider for a moment the equities of the situation. The Court below said that Pope & Talbot's contention is an attempt "to accomplish by indirection the exact same result repudiated" in *Halcyon* (R. 242). It reasoned that *Halcyon* prevents recovery of contribution by one of two joint tort feasors against the other,

and that the effect of Pope & Talbot's contention would be to force Haenn's contribution to Hawn's judgment against Pope & Talbot. However, it is evident that the result sanctioned by the Court below is doubly inequitable and doubly offensive to *Halcyon*, for it permitted Haenn to secure not only contribution, but full indemnity from its partner in fault, Pope & Talbot. If *Halcyon* prevents Pope & Talbot from securing contribution from Haenn, even more must it prevent Haenn from indemnifying itself at Pope & Talbot's expense.

Had Haenn been without fault, or solely at fault, it would still have had to make payments to Hawn under the Harbor Workers' Act. By the fortuitous circumstance that Pope & Talbot combined with Haenn and Hawn to produce the latter's injuries, the basic purpose of the Act should not be obliterated so as to impose Haenn's entire responsibility upon Pope & Talbot. Thus the burden of the injured employee, as between the employer and the third party, is made to weigh inevitably and exclusively upon the third party who happens to contribute to the injury of one within the Act. The Harbor Workers' Act does not permit Haenn to recoup its payments under the present circumstances, and fundamental concepts of fairness prevent such a result. And unless Haenn's recoupment finds support in the Harbor Workers' Act, it cannot be supported at all. It is obvious that independent of the asserted right of subrogation under the Act, there exists no possible basis, under tort law or otherwise for a right of indemnity by Haenn against Pope & Talbot.

The only way in which the compensation payments may be treated so as to give effect to the underlying purpose of the Harbor Workers' Act and the *Halcyon* decision is to permit Hawn to retain the compensation payments made to him, or on his account, under the Act, and to reduce the amount of his judgment against Pope & Talbot accordingly.

Third Question: Whether Pope & Talbot Warranted the Seaworthiness of Its Vessel and Her Appliances to Hawn.

THE PRESENT CASE DOES NOT CALL FOR AN EXTENSION OF THE WARRANTY OF SEAWORTHINESS TO ONE IN HAWN'S STATUS. RATHER, IT SUGGESTS THE PROPRIETY OF REAPPRAISAL OF THE DECISION IN SEAS SHIPPING COMPANY V. SIERACKI. THE SIERACKI DECISION SHOULD BE OVERRULED.

In *Seas Shipping Company v. Sieracki*, 328 U. S. 85, this Court held that a shipowner warrants the seaworthiness of his vessel and its appurtenances to an employee of a stevedore contractor engaged in handling the vessel's cargo. The decision below extends this doctrine to an employee of a carpentry contractor engaged in making alterations and repairs to the vessel's special fittings requisite to the carriage of a particular cargo.

This extension of the *Sieracki* doctrine brings the Court below into direct conflict with the Second Circuit, which has repeatedly refused to extend the *Sieracki* rule beyond the limitations placed upon it by this Court. The conflict is evidenced by such Second Circuit cases as *Guerrini v. United States*, 167 F. 2d 352, cert. den. 335 U. S. 843 (Subcontractor's employee engaged in cleaning vessel's boilers and tanks); *O'Connell v. Naess*, 176 F. 2d 138 (Rigger employed by repair contractor); *Rich v. United States*, 192 F. 2d 858 (Tank cleaner); *Martini v. United States*, 192 F. 2d 649 (Ship repair foreman); *Armento v. United States*, 74 F. Supp. 198 (Carpenter employee of repair contractor); and *Cioffi v. New Zealand Shipping Co., Ltd.*, 80 F. Supp. 98 (Ship's carpenter employed by contractor).

The *Sieracki* decision was, of course, an extension of a species of liability without fault to a class of workers other than seamen, to whom alone it had previously applied. The conflict between the present decision and those cited above

is a striking illustration of the difficulties necessarily involved in piling an extension upon an extension.

The *Sieracki* case decided only that the warranty of seaworthiness extended to a well defined class of workers: employees of a stevedore under contract with the vessel owner. The liability was rationalized on the basis that in times past, the work of loading and unloading cargo was performed by seamen. Consequently, it is said, those who today perform this work, although employed by a party other than the vessel owner, should be entitled to the same warranty of seaworthiness which has traditionally extended to seamen.

It is clear that Hawn does not fall within the defined class of persons to whom the doctrine was extended in *Sieracki*. Moreover, there is nothing to show that the work he was performing was traditionally performed by members of the vessel's crew. Nor is there any evidence that he was exposed to any hazard peculiar to a seaman's employment, which was one of the considerations giving rise to the warranty as to seamen in the first instance. Insofar as the shoreside common law is concerned, there is nothing exotic about a hole in the floor.

These factors immediately repel any suggestion that one in Hawn's circumstances was included within the class to whom the warranty of seaworthiness was extended by *Sieracki*.

If the Courts administering the *Sieracki* rule are permitted to go beyond its holding, and borrow its general language in support of the same result in a different type of case, the potential for contrariety of results is practically boundless. Each individual case will turn upon the interpretation placed by the individual Court upon such general language. For instance, if the test is to be, as the Court below suggests (R. 234), that the individual is "rendering services necessary in the performance of the ship's business of carrying cargo," then conceivably the warranty could extend to practically any business invitee coming aboard the vessel while she is in port. We do not believe

that this Court, in *Sieracki*, ever contemplated such a sweeping result. We do not think, for instance, that this Court intended that the warranty would extend to an electronics engineer, employed by a shoreside manufacturer, who visits the vessel perhaps once a year to test and adjust the vessel's radar equipment. Yet the work he is performing is undoubtedly as "necessary in the performance of the ship's business" as that of the manual laborer who loads the cargo. Such is the fallacy in following the general language, rather than the holding of a decision.

Rather than presenting a situation calling for the extension of the *Sieracki* doctrine, we believe the present case suggests the propriety of reviewing the validity of the doctrine itself. The considerations which militate against its logic and its permissibility are forcefully stated in the dissent filed by Chief Justice Stone, concurred in by Mr. Justice Frankfurter and Mr. Justice Burton. The reasons given in the dissent are just as valid, and just as persuasive today as when first uttered. Indeed, to the extent that the dissent relies largely upon the impact of Congressional legislation in the field of longshoremen's rights, and points out the lack of integration therewith which is implicit in the result reached by the majority, the dissent accurately foretold the approach to the whole problem of maritime personal injury which was taken by this Court in *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp., supra*, 342 U. S. 282. In this light, at least, the decision in *Sieracki* warrants re-examination and, for the reasons advanced in the dissent, should be overruled.

One final point requires attention. The respondent Hawn, in his brief in opposition to the present writ, suggests that the question of the applicability of the doctrine of seaworthiness is moot in the present case. He points out that the jury found that Pope & Talbot was at fault not only by reason of having an unseaworthy vessel, but on the ground of negligence as well. He suggests that since this is so, Pope & Talbot is liable to Hawn in any event.

Depending upon the conclusion reached by this Court as to the first question presented, the present question may or may not become moot. Should this Court hold that Hawn's contributory negligence does not bar recovery, and further hold that the measure of Pope & Talbot's liability is to be based upon any quantitative allocation or apportionment according to the fault of the parties, it obviously makes a great deal of difference whether "fault" can properly be ascribed to Pope & Talbot on the ground of unseaworthiness. If unseaworthiness of the vessel was not properly a species of fault which could be considered in determining the contributions of fault by the various parties to the totality thereof, then any allocation of fault, including that ascribed by the jury to Hawn himself, must necessarily fall.[3]

CONCLUSION.

The judgments of the Court of Appeals in favor of the respondent Charles Hawn, and against the petitioner Pope & Talbot, Inc., should be reversed, and the cause remanded to the District Court with instructions to enter judgment in favor of the petitioner, Pope & Talbot, Inc. and against the respondent Charles Hawn.

Respectfully submitted,

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3. Pope & Talbot was granted an exception (R. 149a) by the Trial Judge to his refusal to affirm Pope & Talbot's ninth point for charge (R. 177a) which would have confined Pope & Talbot's liability to the ground of negligence. It was made clear to the Trial Judge (R. 148a) that Pope & Talbot took the position that the doctrine of unseaworthiness does not apply to Hawn.